Aluminex (M) Sdn Bhd & Anor v United Malayan Banking Corp Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D3–24–17–1989
VC GEORGE J
1 APRIL 1991

Sale of Goods *— Mercantile agent — Title to goods — Purchaser of goods obtaining letters of credit and trust receipts facility from bank to finance purchase — Bank holding title to goods — Sale and delivery of goods by purchaser to sub-purchaser — Whether purchaser a mercantile agent of bank — Purchaser not paid for goods by sub-purchaser — Whether title passed to sub-purchaser*

Securities *— Debentures — Priority — Debentures issued by company in favour of bank creating fixed and floating charges over existing and future assets of company — Company subsequently assigns to another bank its rights and benefits under a contract — Whether interest of second bank subject to interest of first bank*

Trusts and Trustees *— Trust receipts — Bank having benefit of letters of credit and trust receipts issued by purchaser of goods — Bank holding title to goods — Sale and delivery of goods by purchaser to sub-purchaser — Goods not paid for by sub-purchaser — Whether purchaser held anything in trust for bank*

Trusts and Trustees *— Tracing — Assignment to bank of sub-purchaser's rights and benefits under contract to supply goods to a building contractor — Moneys payable to sub-purchaser under contract with building contractor — Bank claiming such moneys — Whether bank may invoke doctrine of following trust money — Whether fiduciary relationship existed between sub-purchaser and bank*

The first plaintiffs ('Aluminex') were appointed by the second and third defendants, who were the main contractors for the construction of a building, as sub-contractors for the design, supply and installation of glass materials for the building. Aluminex entered into a contract with one Meng Sing Glass Sdn Bhd ('Meng Sing') for the supply of the required glass. The first defendants ('UMBC') provided finance to Meng Sing by a letter of credit and trust receipts facility by which UMBC were to provide Meng Sing with the funds necessary to purchase the glass from overseas. Under the terms of the trust receipts, Meng Sing was deemed to hold the glass on trust for UMBC; the proceeds of sale of the glass were also to be kept separate and apart from other moneys and to pay over the same to UMBC. Meng Sing also agreed that in effecting the sale of the glass, they acted as agents for UMBC.

As further security for the facility, UMBC entered into an agreement with Aluminex whereby Aluminex purported to absolutely assign to UMBC its sub-contract with the second and third defendants, including all moneys then and thereafter due and payable to Aluminex. The second and third defendants provided a letter of undertaking to

UMBC to pay the proceeds of the said sub-contract directly into Aluminex's 'collection account' with UMBC. Meng Sing sold and delivered the glass to Aluminex but were not paid. A

Prior to these arrangements, the second plaintiffs ('UAB'), a bank, had granted to Aluminex overdraft facilities which were secured by two debentures granted by Aluminex. Eventually, UAB appointed receivers and managers of Aluminex pursuant to the debentures. At this time, a sum of money payable to Aluminex by the second and third defendants under the sub-contract had been paid to UMBC. B

Aluminex and UAB (the plaintiffs) sought a declaration, inter alia, that UMBC's interest in the assignment was subject to UAB's interest under the debentures. Although UMBC conceded that they were deemed to have notice of the two debentures, they contended that they were entitled to the money under the doctrine of following trust money. C

Held, granting the declarations: D

(1) UMBC had title to the glass by virtue of the issue of the trust receipts, which on release to Meng Sing was held by them on trust for UMBC. Meng Sing thereupon assumed the role of a mercantile agent of UMBC and in that capacity completed the sale of the glass to Aluminex by delivering to Aluminex the glass, whereupon Aluminex obtained good title to the glass. Any and all proceeds of the sale of the glass receivable by Meng Sing had to be held by Meng Sing on trust for UMBC. However, as Meng Sing was never paid for the glass, there was nothing in their hands to hold on trust for UMBC. E

(2) The doctrine of following trust money or trust property or that into which it had been converted had no application here because in the first place, since payment was not received for the sale, there was nothing held on trust, and in any event, the doctrine only applied where there was a fiduciary relationship between the parties. There was no such relationship between Aluminex and UMBC. F G

(3) In the face of the debentures, Aluminex could not properly assign its interest in the sub-contract without the written consent of UAB, and because UMBC was deemed to have had notice of the debentures and of the relevant clauses thereof in particular, they had to get behind UAB in the queue.

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[Bahasa Malaysia summary

Plaintif pertama ('Aluminex') telah dilantik oleh defendan kedua dan ketiga, yang adalah kontraktor utama bagi pembinaan sebuah bangunan, sebagai kontraktor kecil untuk rekabentuk, pembekalan dan pemasangan perkakas kaca untuk bangunan tersebut. Aluminex mengikat kontrak bersama dengan Meng Sing Glass Sdn Bhd ('Meng Sing') bagi pembekalan kaca yang diperlukan. Defendan pertama I

('UMBC') memberi kewangan kepada Meng Sing melalui kemudahan surat kredit dan resit amanah dengan mana UMBC dikenakan memberi Meng Sing wang yang diperlukan untuk membeli kaca dari luar negeri. Di bawah terma resit amanah, Meng Sing disifatkan memegang kaca dalam amanah untuk UMBC, hasil jualan kaca itu juga perlu disimpan berasingan daripada wang yang lain dan dibayar kepada UMBC. Meng Sing juga bersetuju bahawa dalam melaksanakan penjualan kaca, mereka bertindak sebagai ejen UMBC.

Sebagai jaminan selanjutnya bagi kemudahan tersebut, UMBC mengikat perjanjian dengan Aluminex dengan mana Aluminex kononnya menyerahhak sama sekali kepada UMBC kontrak kecilnya dengan defendan kedua dan ketiga, termasuk semua wang yang ketika itu dan sesudah itu patut dibayar kepada Aluminex. Defendan kedua dan ketiga memberi surat akujanji kepada UMBC untuk membayar hasil jualan kontrak kecil tersebut terus ke dalam 'collection account' Aluminex dengan UMBC. Meng Sing telah menjual dan menghantar kaca itu kepada Aluminex tetapi mereka tidak diberi bayaran.

Sebelum persetujuan tersebut, plaintif kedua ('UAB'), sebuah bank, telah memberi Aluminex kemudahan overdraf yang telah dijamin oleh dua debentur yang diberikan oleh Aluminex. Akhirnya, UAB telah melantik penerima dan pengurus bagi Aluminex mengikut debentur itu. Pada masa ini, sejumlah wang yang kena dibayar kepada Aluminex oleh defendan kedua dan ketiga di bawah kontrak kecil telahpun dibayar kepada UMBC.

Aluminex dan UAB (plaintif) meminta deklarasi, antara lain, bahawa kepentingan UMBC dalam penyerahanhak adalah tertakluk kepada kepentingan UAB di bawah debentur itu. Walaupun UMBC menyetujui yang mereka dianggap mempunyai notis akan kedua-dua debentur itu, mereka berhujah bahawa mereka berhak kepada wang itu di bawah doktrin mengikut wang amanah.

Diputuskan, memberikan deklarasi itu:

(1) UMBC mempunyai hakmilik pada kaca itu oleh kerana keluaran resit amanah itu, yang pada pelepasan kepada Meng Sing telah dipegang oleh mereka dalam amanah untuk UMBC. Meng Sing kemudian telah memegang peranan ejen persaudagaran bagi UMBC dan dalam sifat itu menyempurnakan penjualan kaca kepada Aluminex dengan menghantar-serah kaca itu kepada Aluminex, dan pada masa itu Aluminex memperolehi hakmilik yang sah pada kaca itu. Sebarang dan semua hasil penjualan kaca yang patut diterima oleh Meng Sing harus dipegang oleh Meng Sing dalam amanah untuk UMBC. Walaupun demikian, kerana Meng Sing tidak dibayar bagi kaca itu, tiada apa-apa dalam tangan mereka untuk dipegang dalam amanah untuk UMBC.

(2) Doktrin mengikut wang amanah atau harta amanah atau apa jua yang kepadanya ia telah ditukar tidak terpakai di sini kerana pada pertamanya, memandangkan yang bayaran tidak diterima bagi penjualan, tidak ada apa-apa pun yang dipegang dalam amanah,

dan dalam apa keadaan sekalipun, doktrin itu hanya terpakai di mana terdapat hubungan fidusiari di antara kedua-dua pihak. Hubungan tersebut tidak wujud di antara Aluminex dan UMBC.

(3) Memandangkan adanya debentur itu, Aluminex tidak boleh menyerahhak kepentingannya dalam kontrak kecil itu secara teratur tanpa persetujuan bertulis UAB, dan kerana UMBC telah dianggap mempunyai notis akan debentur itu dan khasnya akan klausa yang relevan dalamnya, mereka harus beratur di belakang UAB.]

Karina Merican (*Skrine & Co*) for the plaintiffs.
Juliana Solomon (*Rashid & Lee*) for the first defendant.

Cur Adv Vult

VC George J: On 18 April 1986, Takenaka Komuten Co Ltd and Pembinaan Maluri Sdn Bhd (the second and third defendants herein) who jointly were the main contractors erecting the headquarters building for Bank Pembangunan Malaysia Bhd appointed Aluminex (M) Sdn Bhd, the first plaintiffs, as the sub-contractors for the design, supply and installation of glass curtain walling and frameless glazed screens for the building. This sub-contract was worth some $4,688,177. Aluminex in turn entered into a contract with one Meng Sing Glass Sdn Bhd for the supply of the required glass for the job. This supply contract was worth some $2.3m. Meng Sing was getting the glass from Korean sources. They needed financial assistance to buy the glass.

The United Malayan Banking Corp Bhd ('UMBC') was prepared to finance Meng Sing. The facility granted has been referred to by UMBC as the letter of credit/trust receipt ('LC/TR') facility by which UMBC would provide to Meng Sing the funds necessary to purchase the glass from Korea. Meng Sing was to issue trust receipts in favour of the bank by the terms of which they would be deemed to hold the glass in trust for the bank. Meng Sing was allowed to sell the glass. They were, however, obliged to receive and retain the proceeds of the sale as trustees for the bank and they were obliged by the terms of the trust receipt to keep such proceeds separate and apart from their other moneys and to pay over the same to the bank. By each of the trust receipts Meng Sing stated that they agreed that the bank was the owner of the glass and that in effecting the sale of the glass they acted as agents for the bank.

UMBC had required, apart from the issue of trust receipts, some further security for granting the aforesaid facility to Meng Sing. They wanted an assignment in their favour of the Aluminex sub-contract. In UMBC's letter of offer to Meng Sing the bank stated in respect of security:

> The above facility is to be secured against assignment of the proceeds of the sub-contract awarded to Aluminex (M) Sdn Bhd (Aluminex) valued at $4,688,177 in favour of our bank. Aluminex is to open a collection account with us for this purpose.

It would appear that Aluminex decided to assist Meng Sing to obtain the LC/TR facility. On 16 October 1986 they became party to what is de-

scribed as a 'loan agreement cum assignment' which is exhibited herein as exh A-4 to encl (2). By that document, Aluminex purported to absolutely assign to UMBC Aluminex's said sub-contract including 'all moneys which may now or hereafter become due and payable to (Aluminex) pursuant to and under the (sub-contract) and all benefits, rights and advantages therein and all arrangements and all certificates and documents ... which may be necessary to enable the bank to recover all the above said moneys or any instalments or part thereof ...'. The effect of the assignment was to continue to obtain, until the bank had been fully paid, all moneys owing to it by Meng Sing under the facility. The main contractors also assisted by providing UMBC with a letter of undertaking to pay the proceeds of the Aluminex sub-contract directly into what has been referred to as Aluminex's 'collection account' with UMBC. This was done pursuant to a requirement in UMBC's letter of offer to Meng Sing, viz:

> Please take note that you are to obtain a letter of undertaking from the principal contractor, Takenaka Maluri Joint Venture to pay the proceeds of the contract directly to Aluminex (M) Sdn Bhd's collection account with us. The portion of the moneys paid in respect of work done by your company, ie 50% of the proceeds of the sub-contract awarded to Aluminex (M) Sdn Bhd is to be used to settle the above letter of credit/trust receipt facility.

In the event, UMBC provided the facility to Meng Sing, the Koreans delivered the glass, Meng Sing in turn delivered it to Aluminex and the glass was utilized by Aluminex in completing its obligations to the said main contractors to design, supply and install the glass works. The glass has no doubt become a fixture of the completed Bank Pembangunan Headquarters building.

Now, earlier on 29 March 1982, in consideration of the United Asian Bank Bhd ('UAB') (the second plaintiffs), granting Aluminex certain overdraft facilities, Aluminex had, by a deed of debenture, charged in favour of UAB 'by way of a first charge of all its plants, equipment, machinery and motor vehicles ...' and 'by way of a floating first charge all its undertakings and other properties and assets movable and immovable ...'. Clause 9(b) of the debenture provided that Aluminex 'shall not have power save with the written consent of the bank to create any further mortgage, debenture (whether fixed or floating), charge, pledge or lien in respect of any of the assets of the company covered by this debenture ranking in priority to or pari passu with this debenture'. By cl 18, Aluminex irrevocably undertook 'to assign the benefit of all existing and/or future contracts to be executed by the company in favour of the bank; and towards this direction shall execute such relevant and/or other security documents as may be required by the bank from time to time'.

On 21 March 1984, in consideration of UAB increasing the limit of the overdraft facility, Aluminex provided UAB with a second debenture which was supplemental to the earlier debenture. Again, there was the usual fixed and floating charge covering the then existing assets and all future assets of the company to secure the repayment of the amounts overdrawn.

On 24 September 1987, there were amounts due and owing to UAB by Aluminex on the overdraft facility. The debentures were duly crystallized

and receivers and managers were duly appointed, at whose instance this originating summons was caused to be issued, when the receivers and managers learnt that pursuant to the said letter of undertaking given by the main contractors to UMBC, and pursuant to the said assignment by Aluminex of moneys payable to them in respect of their said sub-contract, the sum of $285,811.88 payable to Aluminex as progressive payments in respect of the sub-contract (as set out in certificates 34 and 35) had been paid to UMBC. Now, the main contractors had by their said letter of undertaking undertaken 'to remit all moneys and payments now or hereafter become due on the sub-contract directly to you (UMBC) and that all cheques issued by us will be addressed as follows: "United Malayan Banking Corp Bhd for account of Aluminex (M) Sdn Bhd — A/c No 0235105268"', and presumably the remittance was accordingly made to that account. In any event, UMBC and UAB have agreed that UMBC will place the amount in a fixed deposit account pending what has turned out to be in effect the outcome of this originating summons.

By prayers (i) and (ii) of the originating summons, the plaintiffs seek declarations to the effect that because the two debentures were duly lodged pursuant to s 108 of the Companies Act 1965 for registration with the Registrar of Companies and were duly so registered, the first defendants, UMBC, are deemed to have notice of the said two debentures and of their terms and conditions.

Learned counsel for UMBC helpfully and properly has conceded that there had been such due lodgment and registration and that accordingly, the plaintiffs are entitled to the declarations sought by prayers (i) and (ii).

UMBC and their counsel, however, dispute the plaintiffs' right to the declaration sought by prayer (iii), ie that the interest of UMBC in the said assignment is subject to UAB's interest as set out in the said two debentures in favour of UAB. There are other prayers which are consequential to the decision in respect of prayer (iii).

As has been seen, apart from the assignment by Aluminex of moneys payable under their sub-contract, UMBC had insisted on other measures to attempt to ensure the repayment of the moneys they had advanced for Meng Sing to obtain the glass that was eventually supplied to Aluminex. They had, as has been seen, required Meng Sing to issue trust receipts in respect of the consignments of glass and which Meng Sing had done in respect of all the glass that had been purchased from the Korean source.

Now, much was made by counsel of the issue of the trust receipts and of the effect of such issue. JR Lingard in his book, *Bank Security Documents*, succinctly explains the effect of trust receipts at para 17.66:

> Bankers to whom goods are pledged often have to release them to the customer so that they can be manufactured or sold. This is done by a trust receipt procedure whereby the customer acknowledges that he holds the goods and the proceeds of sale on trust for the bank. It was held in *Lloyds Bank Ltd v Bank of America National Trust and Savings Association* that when a bank released goods to its customer by such a procedure for the purpose of sale it constitutes the customer a mercantile agent so that persons dealing with the customer in good faith will obtain a good title to the goods by the Factors Act 1889. This, of

A course, is the intention of all concerned in that the bank only looks to the goods until they are disposed of and thereafter to the proceeds of sale which are expressed to be held in trust for it.

In the instant case, because of the issue of the trust receipts, UMBC had title to the glass which on release to Meng Sing was held by them on trust for UMBC. Meng Sing thereupon assumed the role of a mercantile agent of UMBC, and in that capacity completed the sale of the glass to Aluminex by delivering to Aluminex the glass whereupon Aluminex obtained good title to the glass. Any and all proceeds of the sale of the glass receivable by Meng Sing had to be held by Meng Sing on trust for UMBC. The last sentence in that paragraph from Lingard bears repeating:

> This, of course, is the intention of all concerned in that the bank only looks to the goods until they are disposed of and thereafter to the proceeds of sale which are expressed to be held in trust for it.

However, Meng Sing was never paid for the glass. Accordingly there was nothing in their hands to hold on trust for UMBC or at all. Proceeds of sale are the payment received as a result of the sale. Until there was a payment in respect of the sale made there are no proceeds of sale. In the instant case, no payment was made in respect of the sale of the glass to Meng Sing, and as by the delivery of the glass there was completion of the sale, title in the glass had passed, and as no payment therefor had been received by Meng Sing, Meng Sing did not hold anything on trust for UMBC.

It was contended by counsel that UMBC was entitled to get at the money that should have been paid for the glass by invoking the doctrine of following trust money or trust property or that into which it had been converted. This doctrine has no application here because in the first place, since payment was not received for the sale there was nothing held in trust, and in any event, the doctrine only applies where there was a fiduciary relationship between the parties. There was no such relationship between Aluminex and UMBC and accordingly the argument is misconceived.

In the face of the debentures with particular reference to cll 9(b) and 18 in the first and the equipollent clauses in the second, Aluminex could not properly assign its interest in the sub-contract without the written consent of UAB, and because UMBC is deemed to have had notice of the debentures and of those clauses in particular, they have to get behind UAB in the queue. The plaintiffs are entitled to the declaration sought by prayer (iii) of the originating summons and consequently, the plaintiffs are entitled to the prayers (iv), (v), (vi), (vii) and (ix). There will be orders accordingly.

Order accordingly.

Reported by PS Ranjan